STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs.

Supreme Court No. 152448
Court of Appeal No. 317992
Circuit Court No. 10-2936-FC

TIA MARIE-MITCHELL SKINNER,

Defendant-Appellee.
_____/

DENFENDANT-APPELLEE'S BRIEF ON APPEAL

****ORAL ARGUMENT REQUESTED****

"THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID"

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QUESTION PRESENTED

Counterstatement of Question Presented: Does the Sixth Amendment require that the fact(s) exposing a person under the age of 18 to the greater sentence of life without parole under MCL 769.25 be determined by a jury beyond a reasonable doubt, see *Apprendi v New Jersey*, 530 US 466, 476; 120 S Ct 2348; 147 L Ed 2d 435 (2000), in light of *Montgomery v Louisiana*, 577 US ___; 136 S Ct 718; 193 L Ed 2d 599 (2016), and *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012)?

The trial court answered: NO
The Court of Appeals answered: YES
The Plaintiff-Appellant answers: NO
The Defendant-Appellee answers: YES

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

Defendant-Appellee concurs in the Petitioner-Appellant's statement of jurisdiction.

"A Sixth Amendment challenge presents a question of constitutional law that this Court reviews de novo." *People v Lockridge*, 498 Mich 358, 511; 870 NW2d 502 (2015).

SUMMARY OF ARGUMENT AND INTRODUCTION

The statute under review in this case, MCL 769.25, was passed in response to the U.S. Supreme Court's decision in *Miller v. Alabama*, in order to create a sentencing provision for youth convicted of murder that was in compliance with the Eighth Amendment. The Eighth Amendment provides that "for all but the rare juvenile offender whose crime reflects irreparable corruption,"' [Miller] rendered life without parole an unconstitutional penalty for 'a class of defendants' because of their status' – that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery v. Louisiana*, 136 S Ct 718, 734 (internal citations omitted).

To implement this Eighth Amendment dictate, Michigan's law provides that a juvenile, upon only the basis of a conviction of a first-degree murder offense, "shall" be sentenced to a term of years. MCL 769.25(4); MCL 769.25(9). Michigan law also provides that the prosecution may file a motion seeking a sentence of life without parole and, in that motion, allege the grounds on which the government is seeking that enhanced sentence. MCL 769.25(3). If the prosecution files such a motion, a hearing on that motion must be heard, and at that hearing, the court "shall consider the factors listed in *Miller v. Alabama*, … and may consider any other criteria relevant to its decision." MCL 769.25(6). Additionally, if the prosecution files this post-conviction motion seeking life without parole and a hearing is held, the statute requires that the court "shall specify on the record the aggravating and mitigating circumstances" that support the sentence imposed. MCL 769.25(7). These findings of fact, which purport to determine that the youth is irreparably corrupt and may therefore constitutionally be sentenced to life without parole, "alter[] the legally prescribed punishment so as to aggravate it." *Alleyne*, 133 S Ct at 2162. The Sixth Amendment provides that "[w]hen a judge inflicts a punishment that the jury verdict alone does not allow," as it did here, "the jury has not found all the facts 'which the

law makes essential to the punishment' and the judge exceeds his proper authority." *Blakely*, 542 US at 303-04.

The decision of the lower court and the position of the Appellee are also supported by the purpose and history of the Sixth Amendment right to a jury determination.

For these reasons, and the reasons given in this pleading, Defendant-Appellant requests that this Court affirm the Court of Appeals decision in this case. *People v. Skinner*, 312 Mich App 15; 877 NW2d 482 (2015).

PROCEDURAL, FACTUAL AND LEGAL HISTORY

I. Precipitating U.S. and Michigan Supreme Court Case Law and the Juvenile Homicide Sentencing Statutes.

A. *Miller v. Alabama* Holds Mandatory Life Without Parole Unconstitutional for Youth and Prompts Revision of Michigan Statute

On June 25, 2012, the U.S. Supreme Court found that the "Eighth Amendment of the Constitution forbids a sentencing scheme that mandates life in prison without the possibility of parole for youth offenders." *Miller v Alabama*, 567 US 460; 132 S Ct 2455, 2457-58; 183 L Ed 2d 407 (2012); US Const, amend VIII. Reaffirming its recent holdings in *Roper, Graham*, and *JDB*, the *Miller* Court acknowledged that "children are constitutionally different from adults for purposes of sentencing," and categorically less deserving of the most severe punishments. *Miller*, *supra* at 2464.[1]

In forbidding mandatory life sentences for young offenders, the Court extended two strands of precedent. First, the Court examined bans on punishment where there is a disconnect between culpability and the severity of the punishment. The Court reasoned that children are categorically "less culpable than adults," due to the temporary features of youth, including children's susceptibility to "outside pressures . . . from their family and peers," their "lack of maturity," which leads to impulsive and risk-taking behavior, and the fact that their character is

[1] See *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (invalidating the death penalty for youth in light of their inherently lessened culpability); *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010) (barring life without parole sentences for nonhomicide offenses committed by juveniles, following *Roper*, the Court explained "juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable and susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed" (internal quotations omitted)); and see *JDB v North Carolina*, 564 US 216; 131 S Ct 2394, 2404; 180 L Ed 2d 310 (2011) (holding that a suspect's age is relevant under *Miranda*'s custody analysis, the Court acknowledged that, "our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults") (internal citations and quotations omitted).

not as fully-formed as an adult's. *Miller*, 132 S Ct at 2464 (citing *Roper v Simmons*, 543 US at 569 (quotations omitted)).

The second strand of relevant precedent requires individualized sentencing before imposing the ultimate penalty. *Miller*, 132 S Ct at 2463-64 (citing *Woodson v North Carolina*, 428 US 280; 96 S Ct 2978; 49 L Ed 2d 944 (1976)). Reasoning that life without parole is "akin to the death penalty" for children, the Court held that the Eighth Amendment requires consideration of mitigation, including the "mitigating qualities of youth." *Miller*, 132 S Ct at 2467 (internal citation omitted). Stated simply, "youth matters" when imposing the most severe punishment. *Miller*, 132 S Ct at 2465.

Under *Miller*, when sentencing a child the court must conduct an individualized sentencing hearing. In doing so, *Miller* stated that a life without parole sentence should be "uncommon" and reserved for "rare" cases in which the juvenile offender exhibited "irreparable corruption." *Miller*, 132 S Ct at 2469. At a minimum, the hearing must include the following factors:

1) The youth's "chronological age;"
2) Hallmark features of youth – "among them, immaturity, impetuosity, and the failure to appreciate risks and consequences;"
3) "[T]he family and home environment that surrounds [the child], and from which he cannot usually extricate himself – no matter how brutal or dysfunctional;"
4) "[T]he circumstances of the homicide offense, including the extent of [the youth's] participation in the conduct;"
5) "[T]he way familial and peer pressures may have affected him;"
6) The possibility that the child might have been "charged and convicted of a lesser offense, if not for the incompetencies associated with youth – for example, [the] inability to deal with police officers or prosecutors (including on a plea agreement) or [the] incapacity to assist his [or her] own attorneys;" and
7) "[T]he possibility of rehabilitation."

Id. at 2468. A judge or jury "must have the opportunity" to consider these factors, and once they do, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id*. at 2475, 2469.

B. Michigan's Juvenile First-Degree Murder Sentencing Statute

In response to *Miller*, the Michigan legislature enacted MCL 769.25 for sentencing juveniles convicted of first-degree murder.[2] The statute states, "If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, the court shall sentence the defendant to a term of years." MCL 769.25(4). Only if the prosecutor files a timely motion seeking the aggravated life without parole sentence is that greater sentence a possibility. MCL 769.25(3). The prosecution's motion "shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole." MCL 769.25(3). If the prosecutor files such a motion, the individual will file a response. MCL 769.25(5).

If the prosecutor has filed a motion stating the grounds on which the prosecution is seeking to enhance the juvenile's sentence to life imprisonment without possibility of parole, the statute directs that "the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in *Miller v Alabama*, 576 US___; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to

[2] The statute applies to a criminal defendant who was less than 18 years old at the time the crime was committed and was convicted of the offense on or after the effective date of the amendatory act that added this section. MCL 769.25(1)(a). The statute also covers juveniles convicted of violations of MCL 333.17764, 750.16, 750.18, 750.316, 750.436, 750.543f, 750.200 to 750.212a, or any other violation of law involving the death of another person for which parole eligibility is expressly denied under state law. MCL 769.25(2). To undersigned counsel's knowledge, only individuals convicted of first-degree murder committed while they were juveniles have been sentenced under the statute.

its decision, including the individual's record while incarcerated." MCL 769.25(6). At this hearing, "the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing." MCL 769.25(7). If the court determines that the defendant should not be sentenced to life imprisonment without possibility of parole, the individual shall be sentenced to a term of years. MCL 769.25(9) ("If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.").

C. Michigan Supreme Court Cases Post-*Miller*

In *People v. Carp*, 496 Mich 440; 852 NW2d 801 (2014), the Court held that the rule the U.S. Supreme Court announced in *Miller* did not apply retroactively and that the state's constitutional prohibition on cruel and unusual punishment does not categorically bar the imposition of life without parole on juvenile offenders. In doing so, this Court stated that "[r]ather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, MCL 769.25 now establishes a default sentencing range for individuals who commit first-degree murder before turning 18 years of age." *Carp*, 496 Mich at 458. The *Carp* Court, citing the juvenile sentencing statute, noted that "absent a motion by the prosecutor seeking a sentence of life without parole, 'the court shall sentence the individual to a term" of years sentence. *Id.* (citing MCL 769.25(4) and (9)).

Also, recently this Court examined whether the Michigan sentencing guidelines violated a defendant's Sixth Amendment right to a jury trial, finding that the guidelines were

"constitutionally deficient" and imposing a remedy consistent with the approach taken by the U.S. Supreme Court in *United States v. Booker*. *People v Lockridge*, 498 Mich 358, 358; 870 NW2d 502 (2015) (citing United States v. Booker, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005)). The instant case presents the application of the same body of U.S. Supreme Court law, however, to an entirely differently-constructed statutory provision, which affects a tiny slice of cases, instead of the bulk of criminal cases in our state.

D. *Montgomery v. Louisiana* States that *Miller* is a Substantive Rule Which Prohibits the Sentence of Life Without Parole for All Youth Except Those Who are Irreparably Corrupt and Triggers Application of MCL 769.25a.

The U.S. Supreme Court again addressed the issue of juvenile life without parole sentences in *Montgomery v. Louisiana*, 136 S Ct 718; 193 L Ed 2d 599 (2016). The Court examined the right announced in *Miller* and determined that *Miller* had created a new substantive rule of constitutional law that therefore applied retroactively. *Id.* at 736. The Court noted that, under Teague, "[s]ubstantive rules … set forth categorical constitutional guarantees that place certain … punishments altogether beyond the State's power to impose." *Id*. at 729; see also *id*. at 732 (a substantive rule prohibits "a certain category of punishment for a class of defendants because of their status or offense," citing *Penry v Lynaugh*, 492 US 302, 330; 109 S Ct. 2934; 106 L Ed 2d 256 (1989)). The Court found that "for all but '"the rare juvenile offender whose crime reflects irreparable corruption,"' [Miller] rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.* at 734 (internal citations omitted). "Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects " 'unfortunate yet transient immaturity,' " and can only be constitutionally imposed on the "rare" youth whose "crime

reflects irreparable corruption." *Id.* For all but these "rare" youth, the sentence of life without parole is unconstitutional and void. See also *id*. ("*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."); *id.*

II. Procedural and Factual History of *People v. Skinner*

A. Initial Trial and Sentence

On August 16, 2011, Tia Skinner was convicted by a jury of the first-degree murder for the killing of her adoptive father, the attempted murder of her adoptive mother, and of the conspiracy to commit these crimes. On September 16, 2011, she was sentenced to mandatory life without parole for the first-degree murder conviction and sentenced to life in prison for the attempted murder and conspiracy to commit murder charges. The convictions and two paroleable life sentences were affirmed on appeal. *People v Skinner*, unpublished opinion per curiam of the Court of Appeals, February 21, 2013 (Docket No. 306903). While her appeal was pending, the United State Supreme Court decided *Miller*.

B. First Resentencing

As a result of the *Miller* decision, the Michigan Court of Appeals remanded Tia Skinner's case for resentencing on the murder conviction. *Id*. At that resentencing, the court was to consider the factors set out in *Miller*. *Id.*

That hearing was July 11, 2013. No witnesses were called on her behalf and none of the documentary evidence currently in this record was presented by the court appointed attorney. She was again sentenced to life without parole.

While her appeal was pending before the Court of Appeals, on March 4, 2014, MCL 796.25 took effect. On May 30, 2014, the prosecution filed People's Notice of Intent to Seek Life Without Parole Pursuant to MCL 769.25(3).

Meanwhile, cases addressing the retroactive application of *Miller* in Michigan were wending their way through the appellate courts. See *Carp*, 496 Mich. On April 4, 2014, the Michigan Court of Appeals ordered Tia's appeal be held in abeyance pending this Court's decision in *Carp*.

C. July 2014 Remand and Request for a Jury Determination

The Michigan Court of Appeals then remanded Tia Skinner's case and ordered that the "trial court shall resentence defendant-appellant following MCL 769.25." *People v Skinner*, unpublished order of the Court of Appeals, entered July 30, 2014 (Docket No. 317892); Plaintiff-Appellant's Appendix, p. 185A.

In the St. Clair Circuit Court, she moved for her resentencing hearing to be heard by a jury. That motion was denied by the trial court on September 2, 2014. *People v. Skinner*, unpublished order of the trial court, entered on Sept. 2, 2014 (Docket No. 10-002936-FC), Defendant-Appellee Appendix 1 page 1b. A request to stay the proceedings pending an appeal of that question was denied. On September 4, 2014, she filed an emergency motion for interlocutory appeal, requesting that the Court of Appeals address the jury question prior to the resentencing hearing. That request was denied September 17, 2014. *People v. Skinner*, unpublished order of the Court of Appeals, entered Sept. 17, 2014 (Docket No. 323509), Defendant-Appellee Appendix 2, page 2b.

D. Sentencing Hearing Under MCL 769.25

The resentencing hearing under MCL 769.25, began on September 18, 2014, and continued on September, 19 and 24, 2014. For that hearing, Tia Skinner presented testimony of experts, family members, prison officials as well as hundreds of pages of documents—from children's protective services, probate court, juvenile court, the federal court, Tia Skinner, family

members, —pertaining to her personal history and record while incarcerated. A summary of that material is below:[3]

Tia Skinner's biological mother, Valerie Borja-Crabtree began using heroin when she was 12-years-old.[4] Ms. Borja-Crabtree, who was in jail at the time of the resentencing hearing, testified that she was raped by Arthur Mitchell, who was "a supplier to [her] drug dealer," and she unknowingly became pregnant.[5] Ms. Borja-Crabtree continued to use heroin heavily, and in the summer of 1992, she was arrested for a probation violation.[6] A few months into Borja-Crabtree's commitment to the Michigan Department of Corrections, Tia was born Artisha Latoia Mitchell on December 8, 1992.[7]

Borja-Crabtree testified that did not want the state involved and attempted to place the infant with her sister, Mara Skinner, but they could not agree on a suitable arrangement for the baby.[8] As a result, Borja-Crabtree placed newborn Tia in the custody of the biological father,

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[3] Plaintiff-Appellant's Appendix contains the transcripts of this hearing; citations in this brief include reference to both the hearing transcript and to the Plaintiff-Appellant's Appendix. For the transcript citations, "R1" will refer to Resentencing hearing, day 1, September 18, 2014. "R2" will refer to Resentencing hearing, day 2, September 19, 2014. "R3" will refer to Resentencing hearing, day 3, September 24, 2014. Each citation will contain a specific page reference, "p," followed by the page number.

In addition to the testimony, as indicated by Plaintiff, a binder of records and documents were introduced at the hearing. The documents in that binder that are specifically referenced in this brief are included in Defendant-Appellee's Appendix to this Court. For purposes of this Brief, we will refer to exhibits as Exhibit A, then follow with the Tab number and then within the Tab the Document number. E.g., Exhibit A, Tab 1, Doc 1.

[4] R2, p. 327; Plaintiff-Appellant's Appendix, p. 527A.

[5] R2, p. 329, 346; Plaintiff-Appellant's Appendix, p. 529A, 546A.

[6] R2, p. 329-331; Plaintiff-Appellant's Appendix, p. 529A-531A.

[7] R2, p. 358; Plaintiff-Appellant's Appendix, p. 558A.Throughout the rehearing transcripts, Tia's middle name at birth is misspelled. Rather than Latoia it is spelled Latoya in the transcripts.

[8] R2, p. 346-347; Plaintiff-Appellant's Appendix, p. 546A-547A.

For the remainder of this section, Tia Skinner is referred to as "Tia," while her aunt and adoptive mother, Mara Skinner, is referred to as "Mrs. Skinner."

which she described as the "lesser of two evils." Mitchell, had a significant criminal history that included burglary, robbery, and sexual assault.[9]

Ms. Borja-Crabtree stated that she noticed "bruises and marks on her" when Mr. Mitchell brought Tia to the prison during visitation.[10] In early October 1993, Ms. Borja-Crabtree was released on a tether.[11] Concerned about her 10-month old daughter, she violated her parole to retrieve Tia form Mr. Mitchell's drug house, placed her under the protection of her sister, Mrs. Mara Skinner, and then turned herself in for her parole violation.[12]

Shortly after being left with Mrs. Skinner, Children's Protective Services (CPS) became involved.[13] CPS records from the time state that Mrs. Skinner reported to CPS that when she assumed custody of Tia, Tia had a dog bite mark and a cigarette burn on her thigh.[14]

Shortly after, after an initial short placement in a foster home, Tia was placed in Charlevoix with her maternal great grandparents, Mr. & Mrs. Ulrich.[15] According to court documents, Tia remained a ward of Macomb County Juvenile Court and lived in the Ulrich home from approximately November 12, 1993, until July 21, 1997.[16] However, there is some incongruity on this point, as Mrs. Skinner recalled that Tia moved in with her when she was

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[9] R2, p. 330, 346, 351; Plaintiff-Appellant's Appendix, p. 530A, 546A, 551A; Criminal Complaint, US District Court for the Eastern District of Michigan, Exhibit A, Tab 7, Doc 3 (detailing Mitchell's criminal history and federal court charges and federal criminal charges for firearms and cocaine distribution the month after Tia was taken from his custody), Defendant-Appellee's Appendix 3, page 3b.

[10] R2, p. 333; Plaintiff-Appellant's Appendix, p. 533A.

[11] R2, p. 335; Plaintiff-Appellant's Appendix, p. 535A.

[12] R2, p. 336; Plaintiff-Appellant's Appendix, p. 536A.

[13] See Protective Services Initial Services Plan, Unsubstantiated Report, Exhibit A, Tab 3, Doc 4 (noting that a compliant was received on 10-14-93), Defendant-Appellee's Appendix 4, page 6b.

[14] Investigation Report of Children's Protective Services Complaint, Exhibit A, Tab 3, Doc 3, p 5, Defendant-Appellee's Appendix 5, page 29b; R1, p. 71, Plaintiff-Appellant's Appendix, p. 271A.

[15] R1, p. 72-73; Plaintiff-Appellant's Appendix, p. 572A-573A.

[16] Juvenile Court Order dated July 21, 1997, Exhibit A, Tab 4, Doc 11, Defendant-Appellee's Appendix 6, page 37b.

between the ages of two and three-- as much as two years earlier than these records indicate.[17] Tia stated she remembered "a lot of screaming" about having to leave her grandmother's home. R2, p. 359-360. In her psychological assessment of Tia, Dr. Carol Holden noted this "big" transition for Tia and that "[t]he clinical and research literature on attachment suggest that difficulties in attachment are linked to difficulties in later psychosocial functioning."[18]

In July of 1997, the court placed Tia back into the custody of her mother, Ms. Borja-Crabtree.[19] Tia's mother had no intention of raising Tia and placed her in Mara Skinner's custody.[20] On or about December 5, 1997, the Macomb County Juvenile Court dismissed the child protection wardship.[21] Mrs. Skinner became Tia's legal guardian and on August 29, 2008, she and her husband, Paul Skinner, adopted Tia.[22]

After moving in with the Skinner family, Tia had unsupervised visits with her biological father, Arthur Mitchell, until his death in September 2001.[23] In July 2001, Mr. Mitchell was being prosecuted for federal gun and drug charges and was facing life in prison.[24] In exchange for a lighter sentence, he testified against his co-defendants, particularly his nephew. *Id.* Soon after, in September 2001, Mr. Mitchell "allegedly committed suicide (or suspiciously drowned) after testifying against his nephew in exchange for a reduced sentence."[25] The drowning was

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17 R1, p. 33; Plaintiff-Appellant's Appendix, p. 233A.
18 Holden Report, Exhibit A, Tab 6, Doc 2, p 3, Defendant-Appellee's Appendix 7, page 38b.
19 Juvenile Court Order dated July 21, 1997, Exhibit A, Tab 4, Doc 11, Defendant-Appellee's Appendix 8, page 41b.
20 R2, p. 337; Plaintiff-Appellant's Appendix, p. 537A.
21 Discharge Order, Exhibit A, Tab 4, Doc 12, Defendant-Appellee's Appendix 9, page 42b.
22 R1, p. 75; Plaintiff-Appellant's Appendix, p. 275A.
23 R1, p 39-40, 70-72; Plaintiff-Appellant's Appendix, p. 239A-240A, 270A-272A.
24 See *United States v Antonio Ameen*, Exhibit Notebook, Tab 7, Doc 4, Defendant-Appellee's Appendix 10, page 43b.
25 Defendant Ameen's Supplemental Sentencing Memo on Remand, Case No. 93 CR-81183, US Dist Ct ED Mich, Filed Aug. 1, 2006, at 4, Exhibit Notebook, Tab 7, Doc 4, Defendant-Appellee's Appendix, 11, page 72b.

ruled an "accident."[26] Tia, 8, attended the funeral of her biological father, who died at 56 years of age.

By all accounts, Tia was a successful student who was active in extracurricular activities and maintained above average grades.[27] During her teenage years, Tia exhibited signs of depression.[28] She began cutting herself with razor blades.[29] Mara Skinner, by then Tia's adopted mother, discovered this behavior,[30] however, Tia did not receive mental health treatment.[31] This behavior continued while Tia was in prison.[32]

Tia presented the court with evidence of her potential for rehabilitation and her record while incarcerated. Dr. Holden opined in her testimony that Tia has the personal resources to benefit from mental health treatment and other rehabilitative services while in prison.[33] Tia has been taking psychotropic medication,[34] and actively participating in counseling.[35] Ms. Yolanda Jones, a nurse with the Michigan Public Health Institute, testified that Tia was selected through a competitive process to conduct peer education sessions about sexually transmitted diseases, and she has done "very well" as a peer educator.[36]

The prosecution relied on testimony from Tia's family members to support its claims that aggravating factors were present.[37] The prosecution presented testimony from Mara Skinner, Marcel Borja, Jeff Borja, and Jeffrey Skinner. *Id.* Confronted with evidence of both mitigating

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[26] Death Certificate, Arthur Mitchell, Exhibit Notebook, Tab 7, Doc 1, Defendant-Appellee's Appendix 12, page 82b.
[27] R2, p.127-128; Plaintiff-Appellant's Appendix, p. 327A-328A.
[28] R2, p. 368; Plaintiff-Appellant's Appendix, p. 568A.
[29] R2, p. 368-369; Plaintiff-Appellant's Appendix, p. 568A-569A.
[30] R1, p. 54-57; Plaintiff-Appellant's Appendix, p. 254A-257A.
[31] R2, p. 369; Plaintiff-Appellant's Appendix, p. 569A.
[32] R2, p. 370; Plaintiff-Appellant's Appendix, p. 570A.
[33] R1, p. 157-158, 174-176; Plaintiff-Appellant's Appendix, p. 357A-358A, 374A-376A.
[34] R2, p. 370-371; Plaintiff-Appellant's Appendix, p. 570A-571A,
[35] R2, p. 370; Plaintiff-Appellant's Appendix, p. 570.
[36] R1, p. 144-48; Plaintiff-Appellant's Appendix, p. 344A-348A.
[37] R1, p. 2; Plaintiff-Appellant's Appendix, p. 202A.

and aggravating circumstances, the court made multiple findings of facts on the record. For example, the court determined that "[Tia] was not the victim of an abusive or dysfunctional family," and that "Tia had no previous signs of any emotional or psychological problems."[38] The court made determinations about the nature of Tia's relationship with members of her family.[39] The court refused to make findings with regard to Tia's behavior in prison; where all of the evidence before the court was positive. Instead of addressing or crediting any of the positive evidence presented, the court simply noted, "None of us have a crystal ball" and refused to address the potential for rehabilitation.[40] Tia Skinner was again sentenced to life without parole.

E. *Skinner* Court of Appeals Decision

Tia Skinner appealed to the Michigan Court of Appeals, which issued a decision on August 20, 2015. The majority held, "[T]he Sixth Amendment mandates that juveniles convicted of homicide who face the possibility of a sentence of life without the possibility of parole have right to have their sentence determined by a jury." *People v Skinner*, 312 Mich App 15, 20; __ NW2d __ (2015). In examining the statute, the majority found that, at the time of Tia Skinner's conviction she was eligible for a maximum punishment of a default term-of-years prison sentence. *Id.* at 44. In order for her to be sentenced to life without parole, the prosecutor had to file a motion, a hearing held, and additional findings of fact made. Therefore, the majority determined that "the sentencing scheme is akin to the schemes at issue in *Apprendi, Ring, Blakely,* and *Cunningham*" because those schemes, like this one, authorized a court to enhance a defendant's maximum sentence based solely on judicial fact-finding. *Id.* at 45. Based on this reasoning, the majority held that "the statute offends the Sixth Amendment as articulated in *Apprendi* and its progeny." *Id.* at 58. The Government sought leave to appeal in this Court.

[38] R3, p. 8, 9; Plaintiff-Appellant's Appendix, p. 632A-633A.
[39] R3, p.11-12; Plaintiff-Appellant's Appendix, p. 635A-636A.
[40] R3, p. 32; Plaintiff-Appellant's Appendix, p. 656A.

F. Subsequent Relevant Court of Appeals Decision: *Hyatt* Court of Appeals Decision and Conflict Panel Decision.

On January 19, 2016, the Michigan Court of Appeals addressed the Sixth Amendment jury question in the appeal of Kenya Ali Hyatt's conviction for felony murder and sentence to life without parole. *People v Perkins*, 314 Mich App 140, 165, __NW2d _ (2016) (Hyatt was a consolidated case with Perkins). The Court held that it was compelled to follow the Court's previous decision in *Skinner*, but noted that it believed that *Skinner* had been wrongly decided. *Id.* In *Perkins*, the Court determined that the statute did not authorize a court to increase a sentence above a maximum term of years with additional findings of fact, but rather that a sentence of life without parole was not an enhanced sentence under the statute and did not require any findings of fact beyond those in the jury's verdict. *Id.* at 176.

To resolve the conflict between these two decisions, the Court of Appeals convened a special conflict panel, which reached a decision on July 21, 2016. That panel determined that a judge, not a jury, is to determine whether to sentence a juvenile to life without parole under the MCL 760.25. *People v Hyatt*, 316 Mich App 368, __NW2d ___ (2016).

In so holding, the conflict panel determined that the sentencing scheme established in MCL 769.25 only dealt with a juvenile defendant's Eighth Amendment right and did not implicate the Sixth Amendment right. *Id.* at *12 (slip opinion). The panel held that the statute did not call for a finding of fact that increased the maximum penalty for juvenile offenders, despite noting that the imposition of the life without parole sentence was not available under the statute unless the prosecution filed the requisite motion. *Id.* In examining the holding of *Miller*, the conflict panel drew a distinction between requiring individualized sentencing to ensure the proportionality of a sentence—which was the panel's interpretation of *Miller*—and requiring fact-finding prior to aggravating a sentence—which the panel held *Miller* did not do. *Id.* The

panel went on to describe the steps, including a motion and separate hearing, that must occur after the verdict in order to sentence a juvenile defendant to life without parole, but still determined that the statue allowed the sentence to be imposed based solely on the jury's verdict. *Id.* at *14.

The panel also determined that, in order to "provide meaningful appellate review under an abuse-of-discretion standard for a life-without-parole sentence imposed on a juvenile" and "to give effect to our Supreme Court's decision in *Milbourn* and the United States Supreme Court's direction in *Miller* and *Montgomery,* an appellate court must conduct a searching inquiry and view as inherently suspect any life-without-parole sentence imposed on a juvenile offender under MCL 769.25." *Id.* at *23, 24.[41]

ARGUMENT

I. The Sixth Amendment Requires That a Jury Find the Facts that Subject Juvenile Defendants to Possibility of an Aggravated Sentence of Life Without Parole.

This Section examines three of the lead U.S. Supreme Court Sixth Amendment cases – *Apprendi*, *Blakely*, and *Alleyne*, *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000); *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Alleyne v United States*, 570 US__; 133 S Ct 2151; 186 L Ed 2d 314 (2013); see US Const, Am VI; US Const, Am XIV.

Then, it applies this doctrine to Michigan's juvenile first-degree murder sentencing statute. Finally, it inspects additional cases in the *Apprendi* line in context of the relevant Michigan statutes, which help to appreciate the direct and unwavering application of these cases,

[41] The Court in *Milbourn* held that determining whether a sentence was an abuse of discretion required determining whether the sentence violated the principle of disproportionality and noted that courts should guard against routinely imposing the maximum sentence for a crime. *People v. Milbourn*, 435 Mich 630, 645; 461 NW2d 1 (1990).

based in the Sixth and Fourteenth Amendments, to the juvenile first-degree murder sentencing statute.

A. Foundational U.S. Supreme Court Cases That Demonstrate the Sixth Amendment and Due Process Requirement of Jury Fact-finding in Hearings

In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 US at 490; US Const, Am VI; US Const, Am XIV. In that case, after Apprendi pled guilty to second-degree possession of a firearm for an unlawful purpose, the prosecutor filed a motion seeking to enhance his sentence under the New Jersey hate crime statute. The hate crime statute allowed for an extended sentence if the court finds by a preponderance of the evidence that the crime was motivated by a desire to intimidate an individual or group of individuals based on a list of protected categories. The original charge carried a penalty range of 5-10 years; the hate crime statute allowed the penalty to be enhanced to 20 years. The trial judge held an evidentiary hearing on this issue and determined by a preponderance of the evidence that the statute applied to Apprendi's actions, and imposed a 12 year sentence. The *Apprendi* Court cautioned that, for Sixth Amendment purposes, the court is to look at the real-world *effect* of the fact-finding to determine when the Sixth Amendment right to a jury determination is implicated. See *Apprendi*, 330 US at 494; see also *Ring v Arizona*, 536 US 584, 604; 122 S Ct 2428; 153 L Ed 2d 556 (2002).

In *Blakely*, the Court first examined the application of the *Apprendi* line of cases to a system of sentencing guidelines. *Blakely*, 542 US at 303. In *Blakely*, the defendant pled guilty to a second-degree kidnapping with a deadly weapon; a plea that resulted in sentencing guidelines range of 49-53 months. After a sentencing hearing, the sentencing court found that he had committed the crime with "deliberate cruelty," and sentenced Blakely above the guidelines

range to 90 months. Even though the second-degree murder kidnapping provided for a maximum punishment of 10 years, the Court determined that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." In Blakely's case, the statutory maximum – reflecting the facts that he had admitted at his plea hearing or been found guilty of by a jury – was 53 months. *Id.* at 303 ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"). "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority." *Id.* at 303-04 (internal citation omitted).

In *Alleyne***,** the Court extended *Apprendi*'s rule, holding that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne*, 133 S Ct at 2162. (Thomas, J., writing for the Court). The *Alleyne* Court re-examined the application of *Apprendi* to facts that increased the mandatory minimum sentence given. *Id.* at 2160-62. In *Alleyne*, the statutory scheme provided an enhanced mandatory minimum sentence of seven years based on additional conduct of the defendant during the offense (if the defendant "brandished" the firearm). *Apprendi*, 133 S Ct at 2155-56. The Court found that the Sixth Amendment preserves for the jury the determination of facts – like the one that subjected Alleyne to a seven year mandatory minimum – that aggravate the punishment. *Id*. at 2158.

B. Application of the Court's Cases to the Statutes Shows the Right to a Jury Determination.

Individuals who are sentenced under MCL 769.25 are entitled to a jury determination of facts that allow them to be subjected to the greater punishment of life without parole, instead of the usual statutory term of years sentence, in light of *Apprendi*, *Ring*, *Cunningham*, *Alleyne*, and *Miller*, 132 S Ct at 2425, discussed *supra*, and MCL 769.25.

After *Miller*, our legislature amended the first-degree murder statute to provide for the different treatment of adults and juveniles. Adults know, from the homicide statute, that, if convicted of first-degree murder, they "shall be punished by imprisonment for life without eligibility for parole." MCL 750.316(1). The legislative changes following *Miller* amended the first-degree murder statute to provide this punishment "*Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure,"* which means that youth facing a possible conviction under MCL 750.316 are told, instead, to look to MCL 769.25 and MCL 769.25a to determine what punishment they face upon conviction of first-degree murder. *See id.* (emphasis added).

MCL 769.25 & MCL 769.25a provide for two possible sentencing processes. The laws provide that the government may, after conviction, file a motion indicating that it is seeking a life without parole sentence. MCL 769.25(2) ("The prosecuting attorney may file a motion under this section to sentence a defendant described in subsection (1) to imprisonment for life without the possibility of parole if the individual is or was convicted [of an enumerated offense]"); MCL 769.25a(4)(b).

The government motion must be filed within a statutorily-specified time period and "[t]he motion shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole." MCL 769.25(3).

The filing of the motion specifying the grounds on which the government seeks to have the sentencing court impose a life without parole sentence triggers a defendant's right to respond to the motion, MCL 769.25(5) and a required "hearing on the motion as part of the sentencing process." MCL 769.25(6). ("If the prosecuting attorney files a motion . . . the court shall conduct a hearing on the motion as part of the sentencing process."); see also MCL 769.25a(4)(b) (stating that, if filed, a hearing on the prosecutor's motion is conducted under MCL 759.25).

At the hearing on the government's motion, the court "shall consider the factors listed in *Miller v. Alabama*, … and may consider any other criterial relevant to its decision, including the individual's record while incarcerated." MCL 769.25(6). Additionally, if the government files a motion stating the grounds it seeks a life without parole sentence and a hearing on this motion is required, "the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7).

If no government motion requesting a life without parole sentence and alleging grounds on which the prosecution is seeking a life without parole sentence is filed, then no hearing on that motion is held and the court is not required to make record findings regarding "the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." See MCL 769.25(6) (requiring hearing only if government files motion alleging grounds to impose an LWOP sentence); MCL 769.25(7) (requiring record findings in cases where government files motion alleging grounds to impose an LWOP sentence).

Instead, if the government does not file a motion requesting a life without parole sentence and alleging grounds to impose that sentence (with the following hearing and court findings on

the record), then the defendant is statutorily-entitled to be sentenced to a term of years. MCL 769.25(MCL 769.25(4) (statute on direct/new cases, if no motion, then "the court shall sentence the defendant to a term of years" provided by law); MCL 769.25a(4)(c) (statute on retroactive cases, providing that if no motion, then "the court shall sentence the individual to a term of imprisonment" of a range of term of years).

That term of years' sentence can range from a minimum of 25 to 40 years, with a maximum of 60 years. MCL 769.25(9) (stating term of years' sentence range for "new" cases; "the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years"); MCL 769.25a (stating term of years' sentencing range for retroactive cases; "the maximum shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years").

In sum, the Michigan laws related to first-degree murder, MCL 750.316, and sentencing of juveniles to first-degree murder, MCL 769.25 & MCL 769.25a, do not provide that, upon the basis of the conviction only, a youth may be sentenced to life without parole. Instead, solely based upon the jury's determination of guilt, the defendant must be sentenced to a term of years within the statutorily-provided range. See, e.g., *Apprendi*, 530 US at 490; *Blakely*, 542 US at 30-04; *Alleyne*, 133 S Ct at 2155. In order to be eligible for an aggravated sentence of life without the possibility of parole, the government must file a motion specifying the reasons it is requesting a life without parole sentence, a hearing must be held on these allegations at which the court "shall consider" the mitigating factors listed in *Miller*, and "may consider any other relevant criteria," and the court must make findings on the record relating to "aggravating" factors used by the court to impose the greater sentence.

C. Application of MCL 760.25 to Tia Skinner's Case Shows that the Court Engaged in Fact Finding that Aggravated the Sentence to Life Without Parole.

The trial court proceedings in Tia Skinner's case provide an example. In this case, the prosecution file a motion with the grounds on which it was seeking a life without parole sentence, instead of the default term of years' sentence. See People's Notice of Intent to Seek Life Without Parole Pursuant to MCL 769.25(3), Defendant-Appelle's Appendix 13, page 83b. The prosecution sought a life without parole sentence based on five factual grounds. See *id*. at ¶9. When the sentencing court imposed the sentence of life without parole, it specified, on the record, the aggravating circumstances it found in this case. Confronted with evidence of both mitigating and aggravating evidence, the court made factual findings such as "Tia had no previous signs of any emotional or psychological problems," she was "the instigator of the idea . . . and the architect of the plan," and "she was not affected by peer pressure." R3, p 9-10; Plaintiff-Appellant's Appendix, p. 633A-634A. As the U.S. Supreme Court has repeatedly emphasized: "Fact-finding to elevate a sentence . . . falls within the province of the jury employing a beyond-a-reasonable-doubt standard." *Cunningham v. California*, 549 US 270, 273; 127 S Ct 856; 166 L Ed2d 85 (2007).

Kenya Hyatt – whose case is also pending before this Court for determination of whether leave should be granted – provides another example. In that case, Kenya, who was 17 when the crime occurred, was charged and convicted of first-degree felony murder for his involvement in his older cousin's plan to rob a security guard to obtain his gun. After his conviction, the prosecution filed a motion seeking to enhance Kenya's sentence to life imprisonment without parole pursuant to MCL 769.25(3). That motion and accompanying memorandum alleged numerous additional facts relating to Kenya's character, background, and home environment that the government argued were aggravating factors that justified enhancing Kenya's sentence to life

without parole. Plaintiff's Motion and Memorandum to Sentence Defendant to a Term of Life Without Parole, *People v. Hyatt* (No. 13-32654-FC, Genesee County). At the subsequent sentencing hearing, the trial court heard testimony and made findings regarding the presence of aggravating and mitigating factors. Plaintiff-Appellant's Amended Application for Leave to Appeal at 8, *People v. Hyatt*, __ N W 2d __, 316 Mich App 368 (No. 325741) ("On December 29, 2014, the sentencing court specified its findings on the record pertaining to the aggravating and mitigating circumstances relating to Defendant's sentence."). The court determined that Kenya's age was not a mitigating factor, that his "adolescence [was] marred by extreme turmoil," that his school records revealed "a pattern of disrespectful and disorderly behavior," and made findings about the circumstances of the crime. *Id.* at 8-9. Based on the findings of fact, the Court sentenced Kenya Hyatt to life without parole. *People v. Hyatt*, 316 Mich App 368 (2016).

In other words, Tia Skinner's case, as well as Kenya Hyatt's case, shows that in the application of MCL 769.25 (and MCL 769.25a) that the government is moving for youthful defendants be exposed to a greater punishment, is alleging facts that, it believes, merit this greater punishment, and is putting forth evidence and arguing at the sentencing hearing that there are facts about the offense or the offender that show "irreparable corruption" - such that a life without parole sentence could be imposed. The sentencing courts are making on the record determinations of facts that are, the court believes, "aggravating circumstances" that allow it to impose, constitutionally, a sentence of life without parole. These factual findings "alter[] the legally prescribed punishment so as to aggravate it" and, as dictated by *Apprendi*, *Ring*, *Cunningham* and *Alleyne*, "the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne*, 133 S Ct at 2162. Instead of being determined by a

court, these sentence-enhancing factual determinations must be proven beyond a reasonable doubt to a jury. *Id.* at 2155.

The facts found that led to Tia Skinner's eligibility for, and sentence of, life without parole are such facts as described in *Alleyne*, *Ring*, *Cunningham*, and *Apprendi*.

D. Sixth Amendment Death Penalty Cases Show the Application to MCL 769.25 and MCL 769.25a Sentencings.

The U.S. Supreme Court has, since *Apprendi*, consistently applied the Sixth and Fourteenth Amendment requirements of jury finding beyond a reasonable doubt to facts that subject an individual to the death penalty. See *Ring*, 536 US; *Hurst v. Florida*, __US__, 136 S Ct 616, 193 L Ed2d 504 (2016).

In *Ring*, the Court determined that Arizona's sentencing scheme—which allowed a judge to make findings of fact regarding the existence of aggravating factors that exposed the defendant to the death penalty—violated the Sixth Amendment. *Ring*, 536 US. Applying the *Apprendi* rule to a capital case, the Court determined that a jury must find the presence of aggravating factors that make the defendant eligible for the death penalty. *Id.* The *Ring* Court examined a scheme that laid out specific aggravating factors that a judge would determine did or did not exist. *Id.* Even though the judge's fact-finding under the Arizona scheme was constrained to these specific statutory factors, the Court still determined that the Sixth Amendment required a jury to decide whether these factors existed and therefore whether the defendant's sentence could be elevated to the death penalty. *Id*. at 605-06.

In *Hurst*, the Court determined that an advisory jury sentence of either life imprisonment or death does not satisfy the Sixth Amendment when the judge proceeds to make independent findings of fact prior to entering a sentence of life imprisonment or death. *Hurst*, 136 S Ct. Without that fact-finding, the harshest punishment the defendant could have received under that

statute was life without parole. *Id*. at 622. The judge's determination, however, allowed for the imposition of the death penalty, and therefore elevated the sentence. *Id.* at 620. The Court held that the Florida scheme was functionally the same as that which it had already held unconstitutional in *Ring*. Under both statutes, a judge made independent findings of fact that allowed the sentence to be increased to death. *Id.* at 621-22. The jury's advisory sentence in the Florida scheme did not prevent the Sixth Amendment violation because the jury specifically did not provide a factual basis for its decision, so the judge's decision was without the benefit of jury fact-finding. *Id.* at 622; *see also Rauf v State*, 145 A 3d 430 (Del 2016) (striking down the Delaware death penalty on Sixth Amendment grounds); Ala Act No. 2017-131 (Ala 2017) (eliminating the ability of judges to impose a death sentence when a jury has recommended life; Alabama was the last state in the country to not require a jury determination regarding the ultimate punishment).

These cases are important to this one for several reasons. Of course, they form part of the U.S. Supreme Court's substantial doctrine on the question before this Court. For example, MCL 769.25 is substantially the same as the invalidated Florida "hybrid" scheme in *Hurst*. Like the Florida statute, MCL 769.25 establishes a default, maximum sentence that the defendant can receive based solely on the jury's verdict. MCL 769.25(3). That sentence may, however, be elevated to life without parole based on the judge's independent fact-finding at the hearing on the prosecution's motion. MCL 769.25(6). As the Court held in *Hurst*, such a scheme violates the rule established in *Ring* because it allows for an increased sentence based on fact-finding by a judge rather than a jury.

Additionally, these cases show the particular scrutiny that the Court has given to the application of the right to a jury determination in cases when the most severe punishment

available is at stake. In comparing *Ring* to *Apprendi*, the Court noted that the right to a jury trial "would be senselessly diminished" if it required fact-finding for a two year increase in a sentence, "but not the fact-finding necessary to put him to death." *Ring*, 536 US at 609. Because of the high value the democratic system places on juries, juries have historically played a crucial role in exercising the moral judgment of the community and imposing the harshest possible sentence. The moral judgment implicit in a death sentence is precisely the reason the Framers intended, and subsequent case law has upheld, jury determination of facts that subject a defendant to the harshest sentence a community may impose. *Cf. Duncan v Louisiana*, 391 US 145, 159-60; 88 S Ct 1444; 20 L Ed 2d 491 (1968) ("But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments.'").

The U.S. Supreme Court has analogized life without parole for juveniles to the death penalty for adults. *Miller*, 132 S Ct at 2466. "Life-without-parole terms, the Court wrote, 'share some characteristics with death sentences that are shared by no other sentences.' Imprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.' And this lengthiest possible incarceration is an 'especially harsh punishment for a juvenile,' because he will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.'" *Id.* (citing *Graham v. Florida*, 560 US 48, 68, 74; 130 S Ct 2011; 176 L Ed 2d 825 (2010)). *Ring*, *Hurst*, and *Miller* highlight why juries must also find the facts that expose juveniles defendants to a life without parole sentence.

Finally, an examination of *Ring* and *Hurst* help this Court understand the application of this Sixth Amendment line of cases in circumstances when the sentence at issue – here, life

without parole – is subject, itself, to additional Eighth Amendment constraints. In the context of the death penalty, the statutory schemes in *Ring* and *Hurst* are set up in compliance with a long line of U.S. Supreme Court Eighth Amendment cases. For example, in examining the statutes under the Sixth and Fourteenth Amendments, the Court cannot read them so that they would establish mandatory death penalty systems or would not permit wide-ranging mitigation to be considered by the factfinder. See *Woodson v North Carolina*, 428 US 280; 96 S Ct 2978; 49 L Ed 2d 944 (1976) (mandatory death penalty violates Eighth Amendment); *Lockett v Ohio*, 438 US 586; 98 S Ct 2954; 57 L E 2d 973 (1978) (requiring that the factfinder be able to consider and give weight to mitigation about the defendant).

In the context of life without parole, "*Miller* rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 136 S Ct at 734 (internal citations omitted). "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right." *Id*. at 734. In other words, *Miller* directs that "vast majority" of defendants under MCL 769.25 or MCL 769.25a cannot constitutionally be subjected to a sentence of life without parole. *Montgomery*, 136 S Ct at 736. Instead, for all but the rare youth whose crime reflects irreparable corruption, a sentence of life without parole *cannot* be constitutionally imposed. This underlying Eighth Amendment requirement serves as a background for this Court's interpretation of our juvenile homicide sentencing statutes.

II. The Government's Statutory Reading is Inconsistent with the Plain Language of the Statute, the U.S. Supreme Court's Sixth Amendment Law, This Court's Prior Interpretation of the Relevant Statute, and the Constitutional Requirements of Miller and Montgomery.

A. Appellant's Reading is Inconsistent With the Plain Language of the Statute.

The state asserts that a life without parole sentence is authorized for a juvenile defendant upon conviction without additional fact-finding. That assertion is contrary to the plain language of MCL 769.25. Our sentencing statutes further require that, after conviction, the government file a motion seeking the possibility of a sentence of life without parole, and in that motion, identify the "grounds" (facts) that it intends to show to permit an aggravated punishment of life without parole. MCL 769.25(3). After the statutorily-required hearing, state law requires that the sentencing court make findings of fact, including any aggravating facts that could justify a sentence greater than a term of years' sentence. See MCL 769.25(6); MCL 769.25(7) ("At the hearing. . . the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed.").

The government's assertion is also contrary to the Court's insistence that, when examining the Sixth Amendment question, the court must look at how the statutory provisions function. *Apprendi*, 530 US at 494 ("Despite what appears to us the clear "elemental" nature of the factor here, the relevant inquiry is one not of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"). Despite the text and application of our statutory provisions, the Appellant ignores these limits and asserts that all sentences are possible as a discretionary sentencing range. Such a misreading of *Apprendi* necessarily violates its central question: Does the supplemental motion and subsequent finding of irreparable corruption "expose the defendant to greater punishment than that authorized by the jury's guilty verdict?" Yes. It is apparent that life without parole can only

be imposed on a juvenile after the prosecution files its motion, the court holds a hearing on that motion and the court makes findings of fact that determine that the youth can be constitutionally sentenced to life without parole.

B. This Court's Initial Description of the Statute is Consistent with Appellee's Reading.

This Court in *Carp* stated that the statute provides a "default" term of years' sentence. *Carp*, 496 Mich at 458; MCL 769.25(4). Specifically, it emphasized that:

> Rather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, MCL 769.25 now establishes a default sentencing range for individuals who commit first-degree murder before turning 18 years of age. Pursuant to the new law, absent a motion by the prosecutor seeking a sentence of life without parole, 'the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.'(citing MCL 769.25(4) and (9)). *Carp,* 496 Mich at 458.

This Court in *Carp* also indicated that the question of whether defendants were entitled to a jury determination under *Miller* and *Alleyne* was not raised before the Court and, therefore, not decided. *Carp,* 496 Mich at 492, n 20 ("As none of the defendants before this Court asserts that his sentence is deficient because it was not the product of a jury determination, we . . . leave it to another day to determine whether the individualized sentencing procedures required by *Miller* must be performed by a jury in light of *Alleyne.*").

C. The Government's Statutory Reading, in Addition to Being Unsupported by the U.S. Supreme Court's Sixth Amendment Law Would Raise Doubts About the Constitutionality of Our Statutes Under *Miller* and *Montgomery*.

As noted above, *Miller* and *Montgomery* create a substantive Eighth Amendment right, such that individuals whose acts reflect "transient immaturity" are constitutionally barred from receiving a life without parole sentence, while individuals whose acts demonstrate "irreparable corruption" may constitutionally receive a life without parole sentence. *Miller*, 132 S Ct at 2469;

Montgomery, 136 S Ct at 736. The government's forced reading of MCL 769.25 and MCL 760.25a possibly creates a statute where every individual sentenced under this provision is subjected to life without parole, and the individual has to put forward mitigating evidence to reduce the sentence to a term of years. This statutory reading, to avoid the apparent Sixth Amendment violation, would create a statutory scheme that then subjects all youth to a life without parole sentence, contrary to *Miller* and *Montgomery*'s Eighth Amendment requirement – the exact requirement that the statute was created to address. E.g., *Montgomery*, 136 S Ct at 734, 735 (sentencing hearings under Miller must "give[] effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity," which are the "vast majority" of youth convicted of homicide). This Court should reject the Appellant's reading of MCL 76.25 and MCL 769.25a.

While the Court found that only the "rare children whose crimes reflect irreparable corruption" can constitutionally receive a life without parole sentence, the Court did not dictate how states respond to this substantive determination. *Id*. at 735. ("When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."). The Court highlighted that Louisiana's argument that Miller did not explicitly require a finding of "irreparable corruption" – which the state used to try to show that Miller was not substantive – was an exercise of the Court's humility and federalism; it was being "careful to limit the scope of any attendant procedural requirement." *Id.* at 735. The government looks to this language to suggest that Michigan's statute must be constitutionally compliant. This reads too much into the *Montgomery* opinion. As an initial matter, of course, the Court was not considering any Sixth Amendment implications of juvenile

life without parole schemes in *Montgomery*. Equally important, the Court specifically indicated that a state's choice to make all sentences parolable – which would not require distinguishing from children whose crimes reflect transient from those who are irreparably corrupt – would be constitutional. *Montgomery*, 136 S Ct at 736 ("A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.") (internal citations omitted). The language in *Montgomery* signifies the Court's traditional deference to states to create their own procedural rules to effectuate the Court's substantive opinion. *Montgomery*, 136 S Ct at 735. This Court must now analyze the procedure our legislature developed.

D. The Lack of Listed Statutory Aggravating Factors is Irrelevant to the Sixth Amendment Determination

The government has suggested that the fact that the Michigan statutes do not have an enumerated list of aggravating factors is decisive of the Sixth Amendment question. Plaintiff-Appellant's Brief on Appeal at 23-25, *People v. Skinner* (No. 152448). That feature of our sentencing statutes is irrelevant for purposes of the analysis under the Sixth and Fourteenth Amendments, as demonstrated by *Cunningham*, 549 US 270 (2007). The *Cunningham* Court held that California's determinate sentencing law (DSL), which required judges to find aggravating circumstances to elevate a default punishment, violated the Sixth Amendment "by placing sentence-elevating fact-finding within the judge's province." *Id.* at 288. In *Cunningham*, the "default" term was 12 years. The DSL permitted his sentencing judge to impose an upper term of 16 years only when she found an aggravating circumstance that was not an element of the charged offense. *Id.* at 292. The DSL provided that an aggravating circumstance, in addition

to a few enumerated examples, could be "any additional criteria reasonably related to the decision being made." *Id.* at 278-79. At Cunningham's sentencing hearing, "the trial judge found by a preponderance of the evidence six aggravating circumstances," and then increased Cunningham's sentence from the default 12 years to the maximum 16 years. *Id.* at 275. The Court made clear that this statutorily required fact-finding to elevate a sentence from 12 to 16 years – whether a specifically listed aggravating circumstances or "any additional criteria" – "falls within the province of a jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies." *Id.* at 292; see also *Blakely*, 542 US at 305 ("Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence").

As summarized by the *Ring* Court, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – *no matter how the State labels it*— must be found by a jury beyond a reasonable doubt." *Ring*, 536 US at 602 (emphasis added).

III. The Purpose of the Court's *Apprendi* Line of Cases and the History of the Sixth Amendment Right to a Jury Support Requiring Jury Fact-Finding in This Case

A. The *Apprendi* Line of Cases Also Emphasizes the Importance of Notice to the Accused of the Greatest Punishment He or She is Facing; Prior to Trial, Youth Facing First-Degree Murder Charges Are Only On Notice that They Will Face a Term of Years Sentence.

In addition to the historic importance of jury fact-finding, the requirement of fair notice is foundational to our constitutional criminal procedure and is reflected in the *Apprendi* line of cases. See, e.g., *Blakely*, 542 US at 309 (noting that what the offender "knows he is risking" upon conviction is relevant to the jury entitlement). In another context, the Court noted the

nineteenth century case law on notice, and remarked that a function of notice is that it "apprises the defendant of what he must be prepared to meet," *Russell v. United States*, 369 US 749, 763; 82 S Ct 103; 88 L Ed 2d 240 (1962) (also discussion protection against double jeopardy as a function of notice).

In Michigan, individuals who are facing trial can look to the statutory penalty for first-degree murder and know that, unlike their adult counterparts, who "shall be punished by imprisonment for life without eligibility for parole," their punishment is determined by MCL 769.25 and MCL 769.25a. See MCL 750.316(1) (providing the statutory punishment provision for first-degree murder). Before their trial, these youth know that, if they are convicted of first-degree murder, and without additional pleadings and fact-finding, they will receive a term of years' sentence, with the maximum minimum of 40 years, and a maximum of "not less than 60 years." MCL 769.25(4); MCL 769.25(9); MCL 769.25a. Upon conviction of first-degree murder, these now-convicted defendants are still subjected to a statutory term of years' sentence with a minimum of 25 – 40 years and a maximum of 60 years. MCL 769.25(9). It is only at this point that the government files a motion specifying additional facts that it intends to show and that it is seeking to have imposed the greater sentence of life without parole. This motion necessitates a statutory resentencing hearing and findings by the trial court. Only upon these additional, post-conviction events, do defendants have any notice that they may be facing life without parole. Compare *Blakely*, 542 US at 309.

B. History of the Sixth Amendment Right to Jury Determination Supports Appellee's Position.

Throughout the *Apprendi* line of cases, the Court has emphasized the robust jury tradition in the United States, and the importance of juries as a bulwark against government oppression. The *Ring* Court noted the foundational importance of jury fact-finding in homicide cases, even at

the time of the passage of the Sixth Amendment. *Ring*, 536 US at 599. Prior to the adoption of the Sixth Amendment, there was universal agreement that the jury played a crucial role in the administration of justice in the fledgling American legal system. As Alexander Hamilton wrote in the Federalist Papers, "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any vast difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." The Federalist No. 83, at 456 (Alexander Hamilton) (Scott ed 1894).

The right to a jury determination – and the reservation of power to citizens to determine important questions before the court -- was codified in our country's central documents. The Declaration of Independence specifically lists the denial of "the benefit of Trial by Jury" as one of its complaints against the King. The Declaration of Independence para. 20 (U.S. 1776). The right was stated in the text of the Constitution, and in the Bill of Rights. US Const, art 3, § 2; US Const, Am VI (jury trial in criminal prosecutions, US Const, Am VII (jury trial in civil cases). Of the state constitutions written between 1776 and 1787, the only right that every one of them guaranteed was the right to a jury trial in criminal cases. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998), p. 83.

The jury represents the voice of the people in the judicial system. As both John Adams and Thomas Jefferson wrote, the jury was a crucial part of the checks and balances system that the Framers established. See John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 *Works of John Adams* (C. Adams ed. 1850), pp 252, 253; Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 *Papers of Thomas Jefferson* (J. Boyd ed. 1958), pp 282, 283. The primacy of the jury was essentially an extension of the idea that the people are

sovereign in a democratic system of government. 1 A. De Tocqueville, *Democracy in America* (Vintage ed. 1945), pp 293-94.

The jury was framed as another way of ensuring that the power in all the branches of government was truly given to the people, and the role of the jury was likened to that of the representative legislature. See *Blakely*, 542 US at 306 (citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti–Federalist 315, 320 (H. Storing ed.1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control ... in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."). In his examination of originalism, Stephanos Bibas writes, "The Framers prized the jury as the representative, democratic lower house of the bicameral judiciary, a populist check on arbitrary judges." Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 Geo LJ 183 (2005). The separation of powers principle was meant to apply not only at the macro level of governmental organization, but also within each branch, and therefore "juries also play a role in the separation of powers (or checks and balances) in criminal procedure. By safeguarding juries against judicial encroachment, the Constitution protects juries' power to check judges, legislatures, and prosecutors." *Id.*

IV. Jury Determination of Irreparable Corruption that Could Subject Youth to an Enhanced LWOP Sentence is Feasible; Michigan and Other States Can and Do Have Juries Find Sentencing Facts or Other Complex Facts.

A. The Number of Possible JLWOP Cases Is, Proportionate to Felony Cases, and Even to Capital Cases in Michigan, is Small.

The government has suggested that it is inefficient or somehow unduly burdensome to effectuate defendant's Sixth Amendment jury trial rights in this case. Plaintiff-Appellant's Brief on Appeal at 30-31, *People v. Skinner* (No. 152448). A closer look shows that the practical impact of having a jury instead of a judge as the factfinder exposing individuals to a possible life without parole sentence – which is, of course, irrelevant to the Sixth Amendment question before the Court – is not the unprecedented and onerous task that the government implies.

In Michigan, there are approximately 360 cases in which juveniles have been sentenced to mandatory life without parole whose convictions and sentences span six decades from the 1960s to present day. According to data provided by the Attorney General's office to the U.S. Supreme Court, in the decade before *Miller* was decided (from 2002-2011), when the sentence of life without parole was still automatic upon conviction for first-degree murder, three to nine juvenile defendants annually, over the entire state, received life without parole for an offense in that year. Brief for Michigan and 15 Other States as Amici Curiae Supporting Respondent, *Montgomery v Louisiana*, 135 S Ct 1546 (2015). By way of comparison, the state court's caseload report for 2016 for Wayne County Circuit Court alone shows a caseload of 1,631 *capital* cases, over 12,000 other criminal cases, and over 400 jury trials in that one year. *2016 Court Caseload Report, 3rd Circuit Court of Wayne County Summary*, available at http://courts.mi.gov/education/stats/Caseload/Pages/2016%20Caseload/Wayne.aspx.

Miller and *Montgomery* state that the circumstances in which sentencing a juvenile to life without parole will be rare and requires distinguishing between juveniles whose crimes reflect

transient immaturity and those whose crimes reflect irreparable corruption. See *Miller*, 132 S Ct at 2469 ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"); see also *Montgomery*, 136 S Ct at 733-34.

It is undisputed that our statute contemplates that not all youth convicted of first-degree murder will be subject to life without parole. Under the Michigan statutes, the prosecutor is meant to exercise their charging discretion whether or not to file a motion with the reasons he or she is seeking a life without parole sentence, which necessitates the subsequent hearing and court determination. Without this motion, hearing and fact-finding, the court can hold sentencing hearings for term of years' sentences that do not implicate the Sixth Amendment right to a jury determination. In practice, of the approximately 360 cases of juveniles convicted of first-degree murder who are to be sentenced or resentenced under MCL 769.25 and MCL 769.25a, the government filed a motion with the reasons it is seeking a life without parole sentence in approximately 229 cases.[42] Any burden of the volume of these cases is attributable to prosecutorial charging decisions, not the identity of the factfinder at the subsequent proceeding.

[42] The distribution of filings is not even across the state and was determined by the prosecutor in the county where the offense occurred. See Jameson Cook, *Smith seeking life without parole for all of Macomb's juvenile lifers*, The Macomb Daily (Sept. 14, 2016) (citing 229 as the number of total government motions for life without parole in Michigan, and noting that Macomb County has filed seeking a life without parole sentence in 12 of 12 cases and that Oakland County had filed motions seeking life without parole in 44 of 49 cases); Gary Ridley, *Prosecutor Wants Murder Sentences Upheld in 23 Juvenile Lifer Murder Cases*, MLive (July 21, 2016) http://www.mlive.com/news/flint/index.ssf/2016/07/prosecutor_wants_life_sentence.html (stating that Genesee County prosecutors filed motions seeking life without parole in 23 of 27 cases in the county).

As a general rule, counties with larger criminal court systems have a greater number of individuals who are subject to the sentencing or resentencing under MCL 769.25 and MCL 769.25a; the number of individuals currently serving an unconstitutional mandatory juvenile life without parole sentence is proportionate to the size of the county's criminal courts system. Sixty-three of Michigan's 83 counties have zero to one individual who are serving a sentence of juvenile life without parole and the government has a pending motion filed with the reasons it is seeking a life without parole. Ten additional counties have two or three individuals. Only seven counties have ten or more individuals, even in the current system, where county prosecutors in some of these counties have filed motions on all or nearly all cases.

Even in cases in which the government has filed a motion with the grounds on which it seeks a life without parole sentence, anecdotal information suggests that, at least some cases of these cases will still result in an agreement to a term of years sentence; not a statutory hearing. Further, in the still smaller number of cases that proceed to a full hearing on the government's motion, nothing in our statutes or law contemplates that jury waiver could not – and will not – occur in some of these cases, just as it does for some trials. See, e.g., MCR 6.401 (providing for waiver of jury right); Christina Hall, *Man to Get Years, Not Life Without Parole*, in Murder, Detroit Free Press, (August 25, 2015), http://www.freep.com/story/news/local/michigan/macomb/2015/08/25/man-juvenile-murder-parole-jail-sentence-court/32348479/ (reporting on a waiver case).

Additionally, the hearings on the government's motions to seek life without parole will be similar in character, regardless of the identity of the fact-finder. Regardless whether a jury or a judge makes the factual determination subjecting a defendant to life without parole, the

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Some have critiqued the government's zealousness in filing motions seeking to have imposed the greater sentence of life without parole. *See, e.g.*, *Michigan Prosecutors Defy the Supreme Court*, The New York Times (Sunday Review Editorial, editorial board), (Sept. 10, 2016).

factfinder in these cases will hear evidence from lay-witnesses, experts, and documentary evidence that are relevant to the determination of whether the individual is "irreparably corrupt," such that under *Montgomery*, he or she can be constitutionally subjected to the sentence of life without parole. Many of these cases will be in front of successor judges, who have no familiarity at all with the trial record or prior proceedings. The government's motions to request life without parole in approximately 63 percent of cases in Michigan will take time and resources, but that time and resources will occur whether the factfinder is a judge or a jury.

B. Michigan Has Had Some, Though Limited, Experience with Jury Involvement at the Sentencing Phase; Jury Determination of Facts in These Cases Would Not be Completely Novel.

The reliance on a jury for factual determinations to enhance sentencing statutory schemes is neither unprecedented nor unworkable in Michigan. While Michigan has limited experience with jury finding of sentencing facts, two provisions – the habitual offender provision and the sexually delinquent person provision – suggest it is workable.

In the past, the habitual offender provision required a jury to find the requisite fact of a previous conviction before the harsher sentence could be imposed. MCL 769.13, as amended by 1994 PA 110. The elements to be determined by the jury and the procedural requirements were laid out in the statute.

This enhanced sentencing obligation emerged from the common law and was observed by the courts for decades until recently. See, e.g., *People v Hastings*, 94 Mich App 488; 290 NW2d 41 (1979). The provision did not require particularly complex or intricate evidence, but was used in a number of cases. The habitual offender provision was subsequently amended by the legislature to no longer require separate jury determinations; in part, because of the volume of cases that come under this provision. Steven Kaplan, *An Overview of the Habitual Offender Laws*, 74 Mich BJ 916 (1995).

Another pertinent example is the sexually delinquent person statute, which allows the prosecutor to bring an additional charge on the grounds that the defendant was a sexually delinquent person at the time of the offense. MCL 750.10a (providing the definition); MCL 767.61a (providing the procedure); see also *People v. Breidenbach*, 498 Mich 1; 798 NW2d 738 (2011) (finding that a separate jury trial is not required, though is permissible, to determine whether a defendant is a sexually delinquent person). The determination of whether someone is a sexually delinquent person – which is made by a jury – is to be made with the assistance of expert testimony. MCL 767.61a. This example shows that, with the assistance of jury instructions from the court, juries in Michigan determine difficult and complex questions in criminal cases that require expert testimony; implementing the Sixth Amendment requirement does not pose a task our citizen-jurors are not capable of doing.

C. Juries Can, and Do, Make Fact-Finding on Complex Questions, Like the Question of Whether a Youth is "Irreparably Corrupt."

The prosecution suggests that the complexity of the task in finding for the aggravating factor of irreparable corruption is too complex or perhaps inefficient for the purposes of sentencing youth to life without parole. Plaintiff-Appellant's Brief on Appeal at 30-31, *People v. Skinner* (No. 152448). Some would argue that the question of efficiency is not relevant: "The founders of the American Republic were not prepared to leave [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." *Apprendi*, 530 US at 498 (Scalia, J., concurring).

Even if relevant, as noted earlier, many of these cases will require a factfinder – no matter the identity – to learn anew the facts of the case, and in all cases the evidence presented at the hearing under MCL 769.25 will be new. Finally, juries handle complicated, nuanced tasks and

instructions all the time. Death penalty cases are an obvious comparison, where jury finding of aggravating circumstances can make an individual eligible to receive the death penalty,[43] but closer to home, civil juries rule on complex, multi-part questions as a matter of course.

The prosecution bemoans a lack of clear guidance issued with regard to the *Skinner* determination. Of course, the work of writing jury instructions has not been completed yet, as this Court has not ruled. But, just like courts and lawyers across the United States have formulated constitutional and clear jury instructions for aggravating circumstances in death penalty cases, our courts and lawyers will too.

Respectfully submitted,

Dated: April 25, 2017

JUVENILE JUSTICE CLINIC

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[43] See, e.g., Cal Penal Code Sec. 190.2(18) ("The murder was intentional and involved the infliction of torture"); Georgia Code Ann. Sec. 17-10-30(7) ("The offense of murder . . .was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"); cf. *Godfrey v. Georgia*, 446 US 420, 100 S Ct 1756, 64 L Ed 2d 398 (1980) (finding prior related Georgia aggravating circumstance unconstitutional without limiting construction).

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs.

Supreme Court No. 152448
Court of Appeal No. 317992
Circuit Court No. 10-2936-FC

TIA MARIE-MITCHELL SKINNER,

Defendant-Appellee.
_____/

PROOF OF SERVICE

Kimberly Thomas, certifies that on April 25, 2017, she served a copy of the Defendant-Appellee's Brief on Appeal, Defendant-Appellee's Appendix and this Proof of Service upon Office of the Prosecuting Attorney, Hilary B. Georgia, e-service using the TrueFiling system which will send notice to all counsel of record by e-mail.

I declare that the statement above is true to the best of my information, knowledge and belief.

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